

TESTIMONY
OF
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DEPUTY SECRETARY
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
ON
INDIAN WATER RIGHTS: PROMOTING THE NEGOTIATION AND IMPLEMENTATION OF WATER
SETTLEMENTS IN INDIAN COUNTRY

MARCH 15, 2012

Chairman Akaka and Vice-Chairman Barrasso, and, Members of the Committee, my name is David J. Hayes, and I am the Deputy Secretary of the Department of the Interior (Department).

Thank you for the opportunity to appear before you today to discuss this Administration's policy on Indian water rights settlements. As you may know, I served first as Counselor to then-Secretary of the Interior, Bruce Babbitt, and later as Deputy Secretary during the Clinton Administration. In those capacities, I chaired the Department's Working Group on Indian Water Settlements and played a leadership role in the Department's Indian water rights program. During those years, we worked on numerous water settlements. Some of the settlements, including the Zuni Indian Tribe Water Rights Settlement; the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement; the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement; the Yavapai-Prescott Indian Tribe Water Rights Settlement; the Confederated Tribes of the Warm Springs Reservation Water Rights Settlement; the Las Vegas Paiute Settlement; and major amendments to the Colorado Ute Indian Water Rights Settlement Act, came to fruition during that time. Significant groundwork was also laid on other important settlements that occurred later, including the Arizona Water Rights Settlement; the Soboba Band of Luiseno Indians Settlement; and the Snake River Water Rights Act.

I. Introduction

The Obama Administration recognizes that water is a sacred and valuable resource for Indian people and therefore has re-energized the Federal Government's commitment to addressing the water needs of Native American communities through Indian water rights settlements. Water settlements not only secure tribal water rights but also help fulfill the United States' promise to tribes that Indian reservations would provide their people with permanent homelands. Indian water settlements help achieve that goal, while at the same time ending decades of controversy and contention among tribes and neighboring communities over water. Indian water settlements provide certainty, which fosters cooperation in the management of water resources.

In the last Congress, this Administration supported four Indian water rights settlements for seven tribes at a total Federal cost of more than \$1 billion. All told, these settlements resolved well over a century of litigation and bitter disputes. These settlements were enacted into law in the

Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 9, 2010). Support for four Indian water rights settlements that were ultimately enacted during one Congress is an unprecedented achievement. This Administration's active involvement in the negotiations of these settlements led to both significant improvements in the terms of the settlements and reduction in their Federal costs, which ultimately led to our support for them. Our support for these four settlements clearly demonstrates that settling Indian water rights disputes is a high priority for this Administration and confirms that we would support Indian water settlements that result from negotiations with all stakeholders including the Federal government, and that come with a reasonable Federal price tag and good cost share contributions from states and other benefitting parties.

Effective implementation of the four settlements in the Claims Resolution Act will support the maintenance of permanent water supplies and enhance economic security for five Pueblos in New Mexico, the Crow Tribe of Montana, and the White Mountain Apache Tribe of Arizona. The agreements enable the construction and improvement of domestic reservation water systems, irrigation projects, and a regional multi-Pueblo domestic water system, and also will codify water-sharing arrangements between Indian and neighboring communities. These four settlements intend to usher in a new chapter on water in these regions - one marked by certainty, harmony, and economic activity.

In addition to its work to enact these four settlements, this Administration is working with the parties to allow the release of \$21 million in federal funding under the Soboba of Luiseño Indians Settlement Act, Pub. L. No. 110-297 (July 31, 2008), marking the final step in an historic water rights settlement and fulfilling promises made to the Soboba Band and southern California communities when the Act was approved by Congress in 2008. The implementation of the settlement is expected to stabilize water supplies in the region and enhance economic development opportunities for the Band and neighboring communities.

In March 2009, President Obama signed the Omnibus Public Lands Management Act, Pub. L. No. 111-11 (Mar. 30, 2009), which included the Northwestern New Mexico Rural Water Projects Act that settles the long standing water rights claims of the Navajo Nation within the San Juan River Basin in New Mexico. The act authorizes the construction of the Navajo Gallup Water Supply Project which will bring a clean and sustainable water supply to the Navajo Nation, where an estimated 40-percent of residents are dependent upon hauling water for use in their homes, and will help to augment the City of Gallup's drinking water system, which is facing decreasing water supplies. The Navajo-Gallup Water Supply Project is a major component of the Navajo Nation's water rights settlement with the State of New Mexico and was selected by the Administration as one of 14 infrastructure projects across the country to be expedited through the permitting and environmental review processes. The Bureau of Reclamation will initiate construction of the project this spring. The Navajo Gallup Water Supply Project will include the construction of two water treatment plants, 280 miles of pipeline, 24 pumping plants, and numerous water regulation and storage facilities.

Our work is not done, however, and we continue to be active participants in 16 additional negotiations. Two of these, Blackfeet (S. 399/H.R. 3301) and the Navajo-Hopi Little Colorado River Water Settlement (S. 2109/H.R. 4067), are the subject of pending legislation. Both the Blackfeet and Navajo-Hopi bills are the products of a great deal of effort by a multitude of

parties and reflect a desire by the people of Montana and Arizona, Indian and non-Indian, to settle their differences through negotiation rather than litigation. This Administration shares that goal and we are currently working at the highest levels within the Department to craft settlement provisions that the Administration will be able to support.

II. The Impetus for Water Rights Settlements.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can date back 100 years or more, are a tangible barrier to socio-economic development for tribes, and significantly hinder the management of water resources. Settlements of Indian water rights disputes can break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of major water rights holders who are parties to the disputes. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the general Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for more than 30 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.

Indian water rights are especially valuable in the West for many other reasons, including the fact that Indian reserved water rights cannot be lost due to nonuse, and Indian water rights have a priority date no later than the date of the creation of the reservation with which they are associated. Because most reservations were established prior to the settlement of the West by non-Indians, even very senior non-Indian water rights are often junior in priority to Indian water rights. Because most tribes have lacked resources to develop their own domestic water supply systems, irrigated agriculture or other industry to make use of their water resources, their ability to use their water rights has been limited. As a result, Indian water rights have often been used for years by neighboring non-Indian interests and communities with the unfortunate effect of reliance by non-Indians on water to which Indians have the senior rights.

Simply litigating title to water rights has not proven to be an effective solution for tribes or their non-Indian neighbors. Litigation often lasts for decades at great cost to all parties: the Federal government, tribes, states and local water users. Even when litigation is concluded and a court decrees that a tribe has a right to a certain amount of water of a certain priority date, uncertainty persists. If a tribe cannot put its water rights to immediate use, Western water law principles allow other junior users to take advantage of the water until such time as a tribe can put the water to use. This, of course, casts a pall of uncertainty over a water system because junior users have no way of knowing when the tribe will be in a position to use its water.

A judicial decree does not get “wet water” to tribes, nor does it provide new infrastructure or do anything to encourage improved water management in the future. Negotiated settlements, on the other hand, can, and generally do, address these critical issues. Through a settlement, parties can

agree to use water more efficiently or in ways that result in environmental benefits, or to share shortages during times of drought rather than relying on strict principles of seniority in priority date. In exchange for settlement benefits, tribes can agree to subordinate use of their water rights so that existing water uses can continue without impairment. Parties to negotiations can agree to terms for mutually beneficial water marketing that could not otherwise occur because of uncertainties in Federal and State law. Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.

III. The Department's Indian Water Rights Office

This Administration's commitment to Indian water settlements is reflected in the leadership at the Department. Secretary Salazar's vision and the work of so many at the highest levels of our Department make our Indian water rights program a success. My Counselor and the Chair of the Working Group on Indian Water Settlements (Working Group), Letty Belin, along with the Assistant Secretaries of Indian Affairs and Water and Science, the Commissioner of Reclamation, the Office of the Solicitor, and the Secretary's Indian Water Rights Office, work as a team to achieve results that make a real difference, not only for tribes but for all the communities involved.

The Secretary's Indian Water Rights Office (SIWRO) was formally established as part of the Secretariat in 2009, but it has been in existence for more than two decades. The Director of SIWRO leads, coordinates, and manages the Department's Indian water rights settlement program in consultation with the Office of the Solicitor. The current Director, Pamela Williams, reports to Letty Belin, Counselor to the Deputy Secretary, who also serves as the Chair of the Secretary's Working Group on Indian Water Settlements (Working Group).

The Working Group consists of the Solicitor and the Assistant Secretaries and makes recommendations to the Secretary regarding the position of the United States in negotiations. As the Deputy Secretary, I have taken a strong interest in supporting settlement efforts, helping to steer settlement parties towards workable solutions and personally participating in settlement negotiations that seemed to be stuck. The Department works with other Federal agencies, including the Office of Management and Budget and the Department of Justice, in preparing the settlement negotiation positions of the United States.

The Federal Government is guided in negotiations by the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* (55 FR 9223, March 12, 1990) (*Criteria and Procedures* attached at Tab 1). The Department and other Federal agencies participate in settlement discussions at the local level primarily through Federal negotiation teams. The teams interact with settlement parties, explain Federal policies on settlement and, when possible, help mold the parameters of a settlement. The SIWRO interfaces with the teams through Team Chairs appointed to each team in the field. The SIWRO works directly with the Chairman of the Working Group and provides policy direction to the teams throughout negotiations. A representative from the Department of Justice is

appointed to each team, as are representatives from other Federal agencies having an interest in a particular negotiation.

Once a settlement is enacted into law, SIWRO oversees its implementation, primarily through Federal implementation teams, which function much like the Federal negotiation teams only with a focus on helping the Indian tribe and the other parties implement the enacted settlement.

Currently, there are 16 appointed Federal Indian Water Rights Negotiation Teams active in negotiating water rights claims in the western United States. An additional 20 Federal Indian Water Rights Implementation Teams work on implementing congressionally enacted settlements, including the four enacted in 2010. With increasing drought conditions in the United States and pressure from an expanding population, the number of requests for the appointment of new negotiation teams continues to grow.

In the last ten years, six bills authorizing Indian Water Rights settlements with fourteen Indian tribes have been enacted: Zuni, Pub. L. No. 108-34, Nez Perce, Pub. L. No. 108-447, and the Arizona Water Settlements Act, Pub. L. No. 108-451 (Dec. 10, 2004) (Gila River Indian Community, Tohono O'odham Nation), Soboba Indian Tribe, Pub. L. No. 110-297 (July 31, 2008), Omnibus Public Land Management Act, Pub. L. No. 111-11 (Mar. 30, 2009) (Navajo—San Juan, and Shoshone-Paiute Tribes of the Duck Valley Reservation), and the Claims Resolution Act Pub. L. No. 111-291 (Dec. 9, 2010) (White Mountain Apache Tribe, Crow Tribe, Pueblo of Taos, Pueblo of Nambe, Pueblo of Pojoaque, Pueblo of San Ildefonso, and Pueblo of Tesuque). Of the six bills, President Obama signed two of the bills, which settled water rights claims for nine Indian tribes.

IV. Future Challenges

We recognize that much work remains to be done in this area. Through the Federal Negotiation Teams, we are actively participating in ongoing negotiations to settle water rights claims in a number of States including Arizona, Montana, New Mexico, and California. As I stated previously, legislation to approve the Blackfeet and the Navajo-Hopi settlements is currently pending in Congress. We look forward to working with this Committee and the stakeholders of these settlements to produce strong settlements that the Administration can support.

During the litigation, assessment and negotiation phases, the Bureau of Indian Affairs' (BIA) Water Resources and Water Rights Litigation and Negotiation Programs provides technical and factual work product in support of the Indian water rights claims. This program provides the major financial support for the United States to defend and assert Indian water rights. The funds are used by the United States and tribes for activities associated with establishing or defending Indian water rights through negotiations and/or litigation. Program funding is critical to supporting and advancing on-going Indian water rights litigation cases and the Federal and tribal negotiations being conducted to secure adjudicated water rights in lieu of litigation. In the Indian water rights litigation cases, BIA water programs staff coordinate with the Department of Justice and Interior's Office of the Solicitor to provide expert witnesses and consultants' studies to meet court and other deadlines. In addition to providing negotiation and/or litigation support for Indian water rights claims, funds are used for technical research and studies to develop and substantiate

the United States' claims for Indian trust water rights. For fiscal years 2010 to 2012, funding for this program averaged around \$8 million. For FY 2013, the budget request is for \$8.6 million.

Another program within the Department that provides assistance for Indian water rights claims is the Native American Affairs Program (NAAP) within the Bureau of Reclamation (Reclamation). NAAP provides technical support for Indian water rights settlements, and to assist tribal governments to develop, manage and protect their water and related resources. This office also provides policy guidance for Reclamation's work with tribes throughout the organization in such areas as the Indian trust responsibility, government-to-government consultations, and Indian self-governance and self-determination. For fiscal years 2010 to 2012, funding for this program averaged around \$6.8 million. For FY 2013, the budget request is for \$6.4 million.

One of the questions that we must wrestle with, and that we would like to engage this Committee and other stakeholders in further discussions of, is how to fund Indian water rights settlements going forward. Until recently, water rights settlements generally were funded through the Department's discretionary appropriations. Work to be performed under the settlements by Reclamation has come out of Reclamation's budget, and other settlement costs generally have come out of the BIA's budget.

Recognizing that discretionary budgets have been coming under increasing pressure in these tight budget times, Congress recently has included provisions for a variety of innovative funding mechanisms in water rights settlements. The Claims Resolution Act, for example, provided approximately \$650 million of direct funding for the water rights settlements enacted therein, plus an additional \$180 million of funding for the Navajo-San Juan settlement enacted in Pub. L. No. 111-11 (Mar. 30, 2009). Consistent with the budget rules established by the Statutory Pay-As-You-Go Act of 2010 (PAYGO), Pub. L. No. 111-139 (Feb. 12, 2010), Congress must provide for offsets of direct spending contained in legislation in order to avoid increases in projected deficits, and all spending contained in the Claims Resolution Act was fully offset.

Another approach that Congress took in section 10501 of Pub. L. No 111-11 (Mar. 20, 2009) was the creation of the Reclamation Water Settlement Fund. Starting in 2020, this fund will provide a limited level of funding in Indian water rights settlements enacted by Congress involving a role for Reclamation. Because funds from this source are direct spending not subject to further appropriation, increased use of this fund would require offsets to meet the requirements of statutory PAYGO. Congress also provided some funding for future Indian water rights settlements through provisions of the Arizona Water Rights Settlement Act of 2004, Pub. L. No. 108-451 (Dec. 10, 2004), providing that \$250 million be made available from the Lower Colorado River Basin Development Fund to fund Indian water rights settlements in the State of Arizona. Again, since it provides for direct spending, increased use of this fund would require offsets to meet the requirements of statutory PAYGO.

Another issue that settlements face is the need to raise awareness of the value of these settlements to all sides, including at the Federal level. Some in Congress are now questioning whether Indian water rights settlements represent an overall benefit to taxpayers when balanced against the potential consequences and costs of continued litigation over Indian water rights claims. In the settlements that this Administration has supported, and that we would support in

the future, I can tell you that we believe the answer is a resounding yes. The consequences and costs of litigation are different for every particular settlement and, as discussed in the Administration's testimony presented on Indian water rights settlement bills in the last Congress, are not always susceptible to simple quantification. They include the rancor between neighbors that contested litigation can cause, which may last long after the water rights have been adjudicated, as well as the prolonged uncertainty due to the time it takes to litigate complex stream adjudications. Both rancor and uncertainty can have substantial economic consequences for both Indian and non-Indian communities, preventing needed investments in businesses and infrastructure that require reliable water supplies in order to function.

To be clear, Indian water rights settlements should not be categorized as "earmarks." The U.S. Supreme Court's *Winters* doctrine establishes the senior rights of Indian tribes to water to fulfill reservation purposes. Water rights and related resources are trust assets of tribes, and water rights settlements enable the Federal government to protect and enhance those assets. As described in this testimony, the Department has an established program that guides the process of negotiating Indian water rights settlements that satisfy federal criteria. Under the *Criteria and Procedures*, the Administration carries out careful analysis of the appropriateness of the costs of the settlement. Our support is not provided lightly; we have come to this Committee and testified regarding our concerns with proposed water rights settlements that we do not find to have met our requirements for reducing costs, including appropriate cost shares, and producing results. Settlements that are approved through this process are not earmarks.

V. Conclusion

State and local governments, as well as Indian tribes, favor water rights settlement because they can be directly involved in shaping their own destinies, rather than having their fate to be decided by the stroke of a judge's pen. The Federal government should continue to encourage these local efforts to resolve outstanding issues and establish water management regimes that can be the basis for, rather than a drag upon, strong local economic development.

Protracted litigation does not, ultimately, provide solutions to the real problems that communities are facing. Indian water rights settlements can spur desperately needed cooperation. From shortage sharing to water marketing to protection of instream flows, settlements allow people to identify the needed mechanisms to enable investments in a common future. In addition to establishing the basis for the courts to decree rights, these settlements often include infrastructure projects allowing tribes to make use of their water. Recent settlements have provided for projects that will provide desperately needed access to safe drinking water on reservations. These projects can improve public health, providing basic foundations for improving health indicators such as infant mortality rates, and stimulating and sustaining economic development and growth in tribal communities.

According to the Indian Health Service (IHS), today, less than 1 percent of the population in the United States is without access to safe water, while more than 12 percent of American Indian and

Alaska Native homes are without access to safe water.¹ As a result, for the young and old, water-hauling is a way of life on some reservations - a full-time job that limits economic opportunities and perpetuates a cycle of poverty. In these communities, tribal members routinely truck water from storage tanks at stock ponds, or other non-potable or contaminated sources, raising serious public health concerns. According to IHS, many of the homes without access to safe water are at an extremely high risk for gastrointestinal and respiratory diseases at rates similar to developing countries.²

In conclusion, I want to underscore how important this Administration believes these settlements to be. Secretary Salazar is a strong supporter of Indian water rights settlements, and he has been personally involved in efforts to make these settlements a reality. As discussed in this testimony, Indian water rights settlements, when they are done right, produce critical benefits for tribes and bring together communities to improve water management practices in some of the most stressed water basins in the country. Moreover, Indian water settlements ensure that Indian people have safe, reliable water supplies and the means to develop their homelands. I hope that I have a chance to work with this Committee and with all the stakeholders assembled today on additional settlements that can accomplish these worthy goals.

¹ See Testimony of Robert McSwain, Deputy Director, Management Operations, Indian Health Service, before the United States Senate Committee on Banking and Housing, Oversight Hearing on: *Coordination between Federal Agencies Involved in Native American Housing and/or Infrastructure Development* (Mar. 8, 2012) at 4.

² Id.